

## IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

OÜ KULLASADU INVEST, an Estonian	)	
corporation,	)	No. 60990-4-I
	)	
Respondent,	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
LINDA KASK,	)	
Appellant,	)	
	)	
MART KASK, an individual,	)	
	)	
Defendant.	)	FILED: August 24, 2009

Grosse, J. — In this action under the Uniform Foreign Money-Judgments Recognition Act on an Estonian judgment arising out of a debt incurred there by Mart Kask principles of conflict of laws dictate that Estonian law applies to the characterization of the debt as separate or community in nature, as well as to the determination of what property in Washington is subject to the judgment for purposes of execution. Under Estonian law the judgment could be, and was, enforced against the property of Mart Kask and against the joint property of Linda and Mart Kask to the extent of Mart Kask's interest in that joint property. We hold it is likewise enforceable in the state of Washington. The judgment may be enforced against the community property of Linda and Mart Kask, but only to the extent of Mart Kask's undivided one-half interest in that community property. The trial court's decision is accordingly reversed to the extent it went beyond that undivided interest.

### FACTS

In October 2003, Oü Kullasadu Invest registered a final judgment from the

Tallinn Circuit Court of Estonia against Mart Kask in King County Superior Court under the Uniform Foreign Money-Judgments Recognition Act.<sup>1</sup> The trial court dismissed the action on summary judgment because Mart Kask had no property in Washington State other than community property. Oü Kullasadu appealed.

In that first appeal, this court held that the trial court's dismissal of the enforcement action as moot was improper because Mart Kask had incurred the foreign debt while married and had failed to rebut the strong presumption that the debt incurred was a community obligation. In Estonia, the judgment had already been partially satisfied by Mart Kask's one-half interest in the proceeds of the sale of Linda and Mart Kask's joint property.

From the evidence presented, it did not appear to this court that there was a conflict between Estonian and Washington law: action taken by one spouse in business matters is presumably for the benefit of the marital community. Thus, we held the marital property liable for debts incurred by one spouse, notwithstanding that Estonia, unlike Washington, recognizes only joint property. We reversed and remanded with the limited and confusing instruction that the trial court further explore the parameters of Estonian law.

On remand, Mart Kask's wife, Linda Kask, intervened on behalf of herself and the marital community. She presented additional expert testimony on Estonian law, seeking to reargue the questions of the nature of the debt and whether the debt was one that could be satisfied by marital property, whether community or joint in nature.

In December 2007, the trial court granted Oü Kullasadu's motion for entry of final

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<sup>1</sup> See ch. 6.40 RCW.

judgment, finding:

(1) the Estonian judgment registered by Plaintiff Oü Kullasadu against Mart Kask is final, conclusive, and enforceable against Linda and Mart Kask's community property; and (2) that the unsatisfied amount of the Judgment, expressed in U.S. Dollars, is \$215,679.42.

Linda Kask appeals.

#### ANALYSIS

There is little doubt that the trial court believed itself bound by this court's prior opinion, that it had become the law of the case, but that this court was wrong in its approach, both as to the characterization of the debt and with respect to the existence of a conflict. On these points the trial judge was correct, albeit from the benefit of hindsight and additional expert testimony.<sup>2</sup>

We find no fault with the trial court's decision to allow Linda Kask to intervene on remand. In the first appeal, Mart Kask had taken the singular position that the judgment was against him as an individual and hence subjected only his separate property to execution on enforcement in this state. His position was essentially one derived from the pleadings and the form of the judgment. Mart Kask did not undertake,

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<sup>2</sup> While the law of the case doctrine generally prevents a court from reconsidering the same legal issue already determined as part of a previous appeal, there is an exception to its application when the earlier decision is clearly erroneous and the erroneous decision would work a manifest injustice to one party. See RAP 2.5(c)(2); Roberson v. Perez, 156 Wn.2d 33, 42, 123 P.3d 844 (2005). Additionally, questions determined on appeal may be considered again on a subsequent appeal when there has been a "substantial change in the evidence at a second determination of the cause." See Folsom v. County of Spokane, 111 Wn.2d 256, 263, 759 P.2d 1196 (1988).

and certainly did not carry, the burden of overcoming the presumption that because the debt was incurred during marriage it was a community debt. In contrast, on her intervention Linda Kask did undertake this burden and produced significant additional expert testimony on Estonian law.

Jaan Lindmae, an Estonian lawyer for Linda Kask, testified as follows:

3. In Estonia, according to the statutory marital property regime, married persons hold property in two ways. Each spouse has the right to own property in his or her separate capacity, or the spouses can own property together as joint property.

The Estonian Family Law Code defines joint property as follows:

Property acquired by spouses during the marriage is the joint property of the spouses.

Estonian Family Law Code § 14(1).

The Estonian Family Law Code defines separate property as follows:

Separate property of a spouse is property which was in the ownership of the spouse before the marriage, property acquired by the spouse during the marriage as a gift or by succession, and property acquired by the spouse after termination of conjugal relations.

Estonian Family Law Code § 15(1).

4. The Estonian Family Law Code also allows married persons to enter into contracts either as individuals or as representatives of the family unit, and the nature of the obligation determines the manner in which it can be enforced against the separate or joint property of the spouses:

(1) A spouse is liable for his or her proprietary obligations with his or her separate property and with the share of the joint property which would belong to the spouse upon division of joint property.

(2) Spouses are liable for proprietary obligations assumed in the interests of the family with the joint property and the separate property of both spouses.

Estonian Family Law Code § 20.

5. The Estonian Family Law Code does not specify how to define the difference between an obligation assumed by a married person on his or her own behalf and an obligation assumed by a married person on behalf of the family. According to Estonian case law, the determination of

whether an obligation was assumed separately or on behalf of the family is based on an examination of the factual situation of each individual case and especially the objective of the obligation. In legal practice it has been common to consider that for example a car, home furnishings and furniture, as well as home appliances shall be assumed to be obtained in the interest of the family. The creditor bears the burden of establishing whether or not an obligation was taken in the interests of the family.

6. Under Subsection 20(2) the Estonian Family Law Code, spouses are regarded as solidary obligors for any obligation assumed on behalf of the family, which means that any judgment based upon a family obligation can be enforced jointly or separately against either or both of the spouses:

If several persons are to perform an obligation solidarily (solidary obligors), the obligee may require full or partial performance of the obligation from all the obligors collectively, from any one obligor or from some of the obligors separately.

Estonian Law of Obligations Act § 65(1).

7. Under the Estonian Code of Civil Procedure a court judgment is only binding on the actual participants to the proceeding that resulted in the judgment being entered:

A court judgment which has entered into force is mandatory to the participants in the proceeding to the extent to which the claim submitted by the action or the counterclaim is adjudicated by the conclusion of the judgment, unless otherwise provided by law.

Estonian Code of Civil Procedure § 457(1).

8. Thus, in order to obtain a judgment against both spouses based on a family obligation under Subsection 20(2) of the Estonian Family Law Code, the plaintiff is obliged to name both spouses in the lawsuit. If a judgment names only [one] spouse as the judgment debtor, it is not possible to enforce the judgment against the other spouse's share of the joint property or the other spouse's separate property.

9. I will now explain how these general principles apply to the judgment against Mart Kask in favor of Oü Kullasadu which is attached as Exhibit 2 to this declaration.

10. After examining the judgment that was entered against Mart Kask, it is quite clear that the judgment is not based on a family obligation. It is clear from the text of the judgment that the defendant, Mart Kask, used the money received from the plaintiff solely for the purpose of developing his business. It is my opinion that it would have been difficult to prove that this was a family obligation under Estonian law,

and that the plaintiff likely would not have prevailed on such a claim. One may assume that Oü Kullasadu Invest sued Mr. Kask only as an individual rather than as a representative of the family because it would have been difficult or impossible to prove the obligation had been taken in the interest of the family.

11. Regardless of my opinion as to the character of the underlying obligation, Oü Kullasadu chose to sue only Mr. Kask without joining his wife, Linda Kask, in the action. In other words, Oü Kullasadu chose to sue Mr. Kask as if the underlying obligation were his separate obligation and not an obligation of the family. This is a clear indication that Oü Kullasadu did not believe it could prove that Mr. Kask was acting on behalf of the family. The practical result of Oü Kullasadu's decision to sue only Mart Kask without also naming his wife in the lawsuit is that the judgment cannot be enforced against Mrs. Kask's share of the joint property or against Mrs. Kask's separate property. At this point, it is no longer relevant under Estonian law whether Mr. Kask assumed the obligation on his own behalf or on behalf of the family. Oü Kullasadu obtained a judgment solely against Mr. Kask, which prohibits Oü Kullasadu from enforcing the judgment in Estonia based on anything other [than] Mr. Kask's separate liability.

In opposition, on behalf of Oü Kullasadu, Professor Irene Krull of the University of Tartu, Estonia, largely agreed with Lindmae's characterization of Estonian law and concluded:

As a matter of material law, the judgment is enforceable against the whole of defendant's property (incl. his separate property and his part in the joint property of the spouses). For that reason, the judgment entitles the claimant to take all necessary actions to search, identify, determine the ambit and content of defendant's property (incl. have the marital joint property divided) as the applicable procedural (enforcement) law may require. Mr. Jaan Lindmae's opinion (section 11) is inaccurate in stating that Oü Kullasadu Invest (the claimant) is prohibited from enforcing the judgment in Estonia based on anything other than Mr. Kask's (the defendant's) separate liability.

I agree that in Estonia the judgment cannot be enforced against defendant's spouse's separate property or against spouse's part in the joint marital property unless the defendant's spouse is party to the action. However, the judgment against the defendant does not prevent the claimant from taking necessary procedural actions to hold the defendant's spouse or her property co-liaible for the underlying obligation, provided it

will be proved in accordance with applicable procedural law that the underlying obligation has been assumed in the interests of the family.

It is clear from this that the law of Washington markedly differs from that of Estonia in terms of both characterization and execution. But it is also clear that Washington courts have dealt with similar facts and similar contrasting policies.

The signal case for resolution of these issues is Pacific Gamble Robinson Co. [(PGR)] v. Lapp.<sup>3</sup> Not only does PGR involve facts similar to those of this case, but it also recognizes and disposes of the dual issues of both characterization of the debt and the property subject to collection on that obligation in Washington.

The Lapps were residents of Colorado. The husband, Conrad, owned 100 percent of a fruit company to which PGR supplied produce. Conrad agreed to be personally liable for the debt due to PGR. The fruit company and Conrad defaulted. The Lapps moved to Washington where PGR brought suit.

Colorado is not a community property state. The trial court entered summary judgment against Conrad individually, but refused to hold that the community had any obligation on the debt. On appeal, our Supreme Court stated the issue:

This case presents the following issue: Is the creditor on an obligation incurred by one spouse in a foreign, noncommunity property state where both spouses were domiciled, restricted in its recovery to the separate property of the obligor spouse, as the term “separate property” is defined by Washington law, after the couple moves to Washington?<sup>[4]</sup>

And, the court further refined the issue as follows:

Washington has adopted the so-called “center of gravity” or “most significant relationship” approach to contract choice of law problems. In the absence of an effective choice of law by the parties, the validity and

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<sup>3</sup> 95 Wn.2d 341, 343, 622 P.2d 850 (1980).

<sup>4</sup> PGR, 95 Wn.2d at 343.

effect of a contract are governed by the law of the state having the most significant relationship with the contract.

Under the law of this state, a debt is presumed to be a community obligation. The burden of proving that a debt is not a community obligation rests on the community. If the obligation is incurred by the community, then community property, including the earnings of both spouses, is liable for the debt. On the other hand, if a debt is characterized under Washington law as separate, or for the benefit of the husband's separate property, then it may not be satisfied from the earnings of either spouse, because earnings during coverture are community property.

In Colorado, however, as we explain more fully below, the law subjects only the husband's property, including earnings, to payment of a debt incurred by him alone. This is a result not possible under Washington law.

Accordingly, if this transaction had taken place entirely in Colorado, with the Lapps remaining there as domiciliaries, petitioner would have been entitled to judgment against only Conrad Lapp's property, including his earnings. If the transaction had occurred entirely in Washington, however, regardless of whether the debt were characterized as a community or a separate obligation, petitioner would not be entitled to have its judgment satisfied from Conrad Lapp's wages alone. Depending on how the obligation was characterized, petitioner could alternatively reach the wages and earnings of both spouses, or of neither spouse.<sup>[5]</sup>

Because the result was different under the law of the two jurisdictions, the court stated that there was a conflict and engaged in an extensive conflicts analysis to arrive at the determination that the most significant contacts were in Colorado and that Colorado law applied.

In this case, it is not seriously contested that for purposes of characterization of the debt, the result would be different under the law of Washington and that of Estonia. Likewise, it is not seriously contested that the presumptions that apply to a judgment against one spouse in circumstances such as these are quite different. Hence there is

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<sup>5</sup> PGR, 95 Wn.2d at 343-44 (internal citations omitted).



a conflict, and this case presents squarely the same circumstances as PGR and our analysis need only follow theirs.

In Estonia, an obligation like this is that of the husband but can be enforced against the joint property to the extent of the husband's interest. Indeed, that is what happened here. In Estonia, Mart Kask's sole property and his interest in the joint property were subject to the judgment. To paraphrase PGR: thus, a fair application of Estonian law to this debt in an action in Washington is that the same property subject to payment of the debt in Estonia, including Mart Kask's wages and acquisitions, is likewise subject to payment of the debt in Washington, notwithstanding such property is characterized as "community" under Washington law.

In sum, judgment may be enforced against the community property of Linda and Mart Kask, but only to the extent of Mart Kask's undivided one-half interest in that community property. The trial court's decision is accordingly reversed to the extent it goes beyond that undivided interest.

Grosje, J.

WE CONCUR:

Edenfor, J.

Ajda, J.